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| UNITED STATES OF AMERICA | IN THE COURT OF MILITARY COMMISSION REVIEW |
| | REPLY BRIEF ON BEHALF OF APPELLANT |
| | Case No. 00000001 |
| v. | |
| | Tried at Guantanamo Bay, Cuba On 4 June 2007 |
| | Before a Military Commission |
| OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali" | Convened by MCCO # 07-02 |
| | Presiding Military Judge Colonel Peter E. Brownback III |

**TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW**

REPLY BRIEF IN SUPPORT OF THE GOVERNMENT'S APPEAL

In the Military Commissions Act of 2006 ("MCA"), Congress established a comprehensive system for trying unlawful enemy combatants. Congress created this system not only to resolve specific issues in our Nation's ongoing armed conflict with al Qaeda and the Taliban, but also to create a generalized structure for trials in the next armed conflict.

The Government has provided a detailed account of the text, structure, and history of the MCA, explaining how the trial court misunderstood the enduring system for military commissions established by Congress, and how many of the errors below overlooked provisions that resolve dispositive questions in the current conflict. *See* Supplemental Brief in Support of the Government's Appeal ("Gov. Supp."). And the Defense concedes or otherwise does not address every material dimension of that statutory account. *See* Brief on Behalf of the Appellee ("Opp.").

The Government's statutory account demonstrates that military judges are authorized directly to determine "unlawful enemy combatant" status, and thus military commission jurisdiction. The Defense never addresses the bifurcated structure of section 948a(1)(A), which provides disjunctive options for determining military commission jurisdiction; only one requires the prior determination of a CSRT or other "competent tribunal." The Defense does not contest that jurisdictional fact-finding by military judges is an essential and longstanding practice in general courts martial, nor does the Defense identify any statutory text where Congress marked its intent to depart from that practice.

The Government's statutory account also demonstrates that determinations by Combatant Status Review Tribunals ("CSRTs"), rendered under the standard in place at the time of the MCA's enactment, are sufficient to establish military commission jurisdiction. The Defense concedes that Congress, by statute, has determined that al Qaeda and the Taliban are unlawful forces and that all members of those organizations are "unlawful enemy combatants." All that is left to determine an accused's "unlawful enemy combatant" status, in the current armed conflict, is the individualized determination of an accused's association with al Qaeda or the Taliban. And this the CSRTs conducted before the MCA's passage, including Khadr's, had done. The Defense's concessions illuminate the meaning of Congress's mandate that CSRT determinations, made "before" the enactment of the MCA, establish military commission jurisdiction—a statutory term the Defense would cast aside.

The Defense focuses its opposition brief on claims that Congress's clear decisions—mandating jurisdiction in this case—violate the Constitution or international law. Across the board, those claims are wrong and, in many cases, legally irrelevant. The trial court's order of dismissal should be reversed.

## I. The Military Judge May Directly Determine That Khadr Is An "Unlawful Enemy Combatant" and Thus the Military Commission's Jurisdiction

The text, structure, and history of the MCA demonstrate that a military judge may determine the "unlawful enemy combatant" status of an accused and thus the military commission's jurisdiction. A contrary interpretation of the statute would ignore the bifurcated structure of section 948a(1)(A) (Gov. Supp. at 11-14) and the long-standing history of military judges in general courts martial finding jurisdictional facts, by a preponderance of the evidence, through the resolution of pretrial motions (Gov. Supp. at 14-19). The Defense makes no contrary argument grounded in the text, structure, or history of the statute. It does not suffice, at this point, summarily to repeat the trial court's analysis, *see* Opp. at 5-6, which the Government's brief addressed in detail.[1] Nor is it sufficient to infer that the statute is ambiguous from the length of the Government's exposition of the trial court's errors. *See id.* at 6 n.2.

On the basis of its unsupported claim that the statute is ambiguous, the Defense contends that a series of presumptions and canons demand dismissal. One of these is based on a false assertion that a military judge's direct determination of unlawful enemy combatant status would violate international law. These canons and presumptions do not apply here, and cannot otherwise disturb the conclusion required by the statute's text, structure, and history that military judges may directly determine military commission jurisdiction. *United States. v. Monsanto*, 491 U.S. 600, 611 (1989) ("We respect [ ] canons of statutory interpretation, and they are quite often useful in close cases, or when statutory language is ambiguous. But we have observed before that such 'interpretative canons are not a license for the judiciary to rewrite language enacted by

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[1] For example, the Defense summarily contends that the direct determination of "unlawful enemy combatant" status by the military judge would "remove all opportunity" for D.C. Circuit review of that determination. *See* Opp. at 5. The military judge's determination, however, would be reviewable by the D.C. Circuit. *See* 10 U.S.C. § 950g (permitting the D.C. Circuit to review the final judgment of a military commission).

the legislature.'"); *cf. Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2474 (2006) (Breyer, J., dissenting) ("[W]e must retain all traditional interpretive tools—text, structure, history, and purpose[, and] we cannot, through rule or canon, rule out the use of any of these tools, automatically and in advance.").

**A.**

According to the Defense, a military judge's direct determination of jurisdiction violates international law. *See* Opp. at 9-10, 11-14. Ambiguous provisions in the statute (which the Defense fails to identify in any detail) need to be construed to avoid this result, the Defense contends. *See* Opp. at 8, 10-11. This contention is both wrong and irrelevant.

As an initial matter, international law clearly does not require a tribunal separate from the military commission to determine unlawful enemy combatant status. *Compare* Opp. at 9-10. According to the Defense, a military commission is not a "competent tribunal" under Article 5 of the Third Geneva Convention. *See id.* But the Defense never even addresses the dispositive evidence that the military commission is such a "competent tribunal," set forth in the Government's brief. *See* Gov. Supp. at 19-20. The drafters of the Geneva Conventions viewed military commissions as the most perfect form of "competent tribunal," and even considered requiring, for purposes of Article 5, use of a "military tribunal" established to mete out criminal punishment. *See* International Committee of the Red Cross, III *Commentary on the Geneva Conventions* at 77 (J. Pictet, gen. ed., 1960) ("*Commentary*"). Moreover, the drafters expressly contemplated that this purest form of "competent tribunal" could resolve an accused's status *during* the trial of criminal charges. *See* III *Final Record of the Diplomatic Conference of Geneva of 1949*, at 63 (1949) ("Such a decision [on the accused's status] *could be taken in the course of a trial*, as persons taking part in the fight, without the right to do so, are liable to be

prosecuted for murder, manslaughter, ill-treatment or attempt of these crimes, etc.") (emphasis added). The drafters chose the term "competent tribunal" to provide more flexibility to state parties, but the record is clear that a military tribunal convened to determine criminal liability would meet that standard. *See* III *Commentary*, at 77.

The Defense leaves the Geneva Conventions aside, and next turns to a treaty—the Protocol Additional to the Geneva Conventions of 1977—that was never ratified by the United States. *See* Opp. at 10-14. But not even that source, which is not international law applicable to the United States, supports the Defense's contention that "unlawful enemy combatant" status must be determined by a tribunal separate from the military commission. Article 45.2 of the Protocol provides that if a detainee is not a prisoner of war and he "is to be tried by [the Detaining Power] for an offence arising out of hostilities, he should have the right to assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated. Whenever possible under this applicable procedure, this adjudication should occur before trial for the offence." The procedures established by the Rules for Military Commissions satisfy even this standard. The Rules for Military Commission provide the Defense the right to challenge jurisdiction through motion, and if made prior to trial, the challenge would be adjudicated "before trial for the offence." *See* Rule for Military Commissions ("RMC") 905 (c); Gov. Supp. at 14-18.[2] Nothing in Article 45.2, or elsewhere, suggests that the tribunal making

[2] Indeed, the International Committee of the Red Cross *Commentary* on the Protocol makes clear that Article 45.2 is to operate in precisely this manner, through adjudications in preliminary motions before trial but after the charges are pending: "There is no doubt that in principle it is preferable to determine the status of the accused with regard to the protection of the Third Convention, *i.e.*, to make a decision regarding his status as a combatant and prisoner of war, *before deciding the merits of the case*. In this case of an affirmative finding, the charges will *automatically lapse* if the person is simply being tried for participation in the hostilities." ICRC, *Commentary on the Additional Protocols to the Geneva Conventions*, at 556 (Y. Sandoz *et al.*, gen. eds., 1987) (emphases added).

the adjudication of status must be separate in form from the military commission, just that the determination should be made before trial.[3]

In any event, the entire Article 5 framework does not apply to Khadr. Article 5 requires the use of "competent tribunal[s]" only "should any doubt arise as to" the detainee's prisoner of war status. But there is no serious claim that Khadr, or any other member of al Qaeda, is actually a prisoner of war as defined in Article 4 of the Third Geneva Convention or in section 948a(2) of the MCA. Nor has Khadr, or any other member of al Qaeda, seriously claimed that he belongs to a force that wears uniforms, carries its arms openly, is under responsible command, and systematically abides by the laws of war. *See, e.g.*, 10 U.S.C. § 948a(2)(B). Instead, to the extent that any detainee is contesting the allegations of the Government, such detainees are claiming that they are not combatants *at all*. Of course, Article 5 does not address itself to that question. *See, e.g.*, Opp. at 13 n.16. Prisoner of war status is not in doubt here, or generally, in this armed conflict. Suppositions based on Article 5 cannot drive the interpretation of the MCA.[4]

Khadr's claims about international law are also irrelevant. On the face of Khadr's own argument, the so-called *Charming Betsy* canon—avoiding interpretations of ambiguous statutory text that would violate international law—does not apply. *See Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). In this forum, Khadr is arguing that "unlawful enemy combatant" status must be determined by a CSRT, not a military commission with more robust procedures, to avoid violations of international law. *See* Opp. at 8. But in his various civil and

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[3] Of course, Article 45.2 is plainly inapplicable here. After all, the second method for establishing military commission jurisdiction is through a prior determination by a CSRT or a "competent tribunal," *see* 10 U.S.C. § 948a(1)(A)(ii), not the "judicial tribunal" apparently required by Article 45.2. This article cannot by considered as a reasonable guide for the MCA's statutory scheme.

[4] Also, as the Defense realizes (*see* Opp. at 9 n.6), Article 5 only applies in international armed conflicts, *see* Third Geneva Convention Art. 2 (providing that the Third Geneva Convention applies only in armed conflicts between High Contracting Parties), which the war with al Qaeda apparently is not. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 (2006) (holding that the armed conflict with al Qaeda is an armed conflict "not of an international character" covered by Common Article 3 of the Geneva Conventions).

habeas actions in the federal courts, Khadr has argued that the CSRTs violate international law and, worse, are unconstitutional.[5] The *Charming Betsy* canon does not privilege a choice, as the Defense would have it, between two alleged violations of international law.

This disabling internal tension is highlighted by the Defense's brief, where he claims that "the protection of the Geneva Conventions would be illusory if a presumptive POW could be brought before an illegal tribunal (*i.e.* one without the very judicial and other safeguards to which he is presumptively entitled) and be forced to contest the jurisdiction of the tribunal therein." Opp. at 13. The CSRTs, of course, have fewer procedural protections than the military commissions established by the MCA, not least of which is the right to counsel. *See, e.g.*, 10 U.S.C. § 948k. It is thus with great irony that that Defendant argues nonetheless that the "unlawful enemy combatant" determination is the exclusive province of the CSRTs in order to preserve crucial procedural protections.

Moreover, Congress evinced a clear intent that judicial interpretations of the Geneva Conventions not direct the structure of the military commission process. Congress declared, by operation of statute, that military commissions conducted under the MCA are in compliance with Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948b(f). The MCA also bars the invocation of the Geneva Conventions as a source of rights in military commission proceedings. *See* 10 U.S.C. § 948g(b). All persons are barred from invoking the Geneva Conventions as a source of rights in civil actions and habeas proceedings. *See* MCA § 5. The

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[5] *See* Petitioner's Reply Memorandum in Support of His Emergency Motion to Stay Military Commission Proceedings, *Khadr v. Gates*, No. 07-1156, at 8-9 (D.D.C. May 30, 2007) (arguing that his CSRT violated international law); Petition for Writ of Habeas Corpus, *Khadr v. Bush*, at 10-11, 12 (D.D.C. July 2, 2004) (same); First Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Khadr v. Bush*, No. 1:04CV01136 (JDB), at 14-15, 16-18 (Aug. 17, 2004) (same); *see also* Petition for Review under the Detainee Treatment Act of 2005, *Khadr v. Gates*, No. 07-1156, at 2 (May 23, 2007) (arguing the CSRT process violates the United States Constitution); Petition for Writ of Habeas Corpus, *Khadr v. Bush*, at 9-10, 12 (D.D.C. July 2, 2004) (same); First Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Khadr v. Bush*, No. 1:04CV01136 (JDB), at 13-14, 15 (Aug. 17, 2004) (same).

import of these provisions is clear: Congress desired the Act to serve as the exhaustive source of legal protections in military commissions, and assigned the implementation of the Geneva Conventions to the political branches, as many treaties are. *Head Money Cases*, 112 U.S. 580, 598-99 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."). The *Charming Betsy* canon cannot be used to implement those treaties in the face of this statutory text. *See, e.g.*, *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1360 n.21 (Fed. Cir. 2006) (rejecting the invocation of the *Charming Betsy* canon because, *inter alia*, the underlying treaty was non-self-executing).[6] Khadr's mistaken resort to the Geneva Conventions here, in place of serious inquiry into the intent of Congress, is invalid. *See, e.g.*, *Scheidler v. Nat'l Org. for Women, Inc.*, 126 S. Ct. 1264, 1273 (2006) ("[C]anons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent.").

**B.**

Nor has Khadr marshaled any persuasive authority for the proposition that military jurisdiction is to be narrowly construed. All the cases cited by Khadr recognize the obvious—that a military tribunal's jurisdiction is often defined by statute, and that the terms of that statute need to be taken seriously. *See* Opp. at 7. And the Government has done so, providing a thorough explanation for each and every material term in the statute. The Defense, which reflexively resorted to international law without analyzing any feature of the statute's text, structure, or history, stands in stark contrast. The proper rule regarding military jurisdiction was established by the Supreme Court: As the Court held in *McClaughry v. Deming*, 186 U.S. 49

[6] Of course, Khadr's claim that, while he is barred from invoking the Geneva Conventions, this Court may rely on unratified protocols to the Geneva Conventions as customary international law, *see* Opp. at 11-14, is directly contrary to the intent of Congress and falls of its own weight.

(1902), "there are no presumptions in favor of" military jurisdiction. Such a rule of equipoise is not one, contrary to Khadr's claims, that requires dismissal every time a statutory interpretation question touching on jurisdiction is close.[7]

**C.**

Congress actually established an applicable presumption that the Defense would discard. Congress statutorily privileged military commission procedures that "apply the principles of law and the rules of evidence in trial by general courts martial." 10 U.S.C. § 949a(a). And there can be no question that longstanding court martial rules countenance military judges finding facts—by a preponderance of the evidence—to determine jurisdiction in response to preliminary motions. Gov. Supp. at 14-19. The Defense's brief does not contest this proposition in any way. The Defense has not carried the heavy burden necessary to cast aside this long and detailed history.

## II. Khadr's Combatant Status Review Tribunal Determination Is Sufficient To Establish Military Commission Jurisdiction Under the MCA

The Defense concedes that Congress, through the statutory parenthetical contained in 10 U.S.C. § 948a(1)(A)(i), statutorily determined that al Qaeda and the Taliban are unlawful forces. *See* Opp. at 18-19.[8] That concession wholly resolves this case and conclusively establishes the military commission's jurisdiction over Khadr. *See* Gov. Supp. at 22-24.

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[7] In this regard, it is notable that the Defendant is not even seeking to apply the so-called presumption against military jurisdiction to the question whether the military commission actually may have jurisdiction over him, but is only contesting who must decide the question.

[8] In a footnote, *see* Opp. at 18 n.21, the Defense suggests that the President's 2002 memorandum did not determine that members of al Qaeda are "unlawful enemy combatants." The President, however, "accept[ed] the legal conclusion of the Department of Justice," White House Memorandum ¶ 2(a) (Feb. 7, 2002), that members of al Qaeda do not qualify for the protections afforded by the Third Geneva Convention because, among other reasons, "[a]l Qaeda members have clearly demonstrated that they will not follow the[] basic requirements of lawful warfare." Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 10 (Jan. 22, 2002). Any remaining doubt that the President determined members of al Qaeda to be "unlawful enemy combatants" was emphatically laid to rest

Once the unlawfulness of an armed force is established, the only remaining question is the accused's association with the force, in this instance, al Qaeda or the Taliban—and that issue was resolved by Khadr's CSRT. Permitting CSRTs conducted under rules in place at the time of the MCA's enactment to establish military commission jurisdiction is the only reading that gives effect to *all* terms of the statute—"unlawful," the statutory parenthetical, and "before . . . the date of" the MCA's enactment. *See id.* at 25-29. Indeed, Khadr himself recognized the force of this interpretation when he affirmatively so argued in his ongoing civil litigation. *See* Petitioner's Reply Memorandum in Support of His Emergency Motion to Stay Military Commission Proceedings, *Khadr v. Gates*, No. 07-1156, at 2-5 (D.D.C. May 30, 2007) (arguing that his CSRT determination, if left undisturbed, is "dispositive" for purposes of military commission jurisdiction).

Similar to his affirmative argument in civil litigation, the Defense does not meaningfully dispute this statutory analysis here.[9] Instead, recognizing that the statutory parenthetical is fatal

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in Executive Order 13440, signed on 20 July 2007, in which the President "reaffirm[ed]" his determination that "members of al Qaeda . . . are unlawful enemy combatants." 72 Fed. Reg. 40707, 40707 (July 24, 2007).

[9] The Defense offers only three arguments even remotely related to the statute, none of which seriously addresses the Government's interpretation of the MCA. First, Khadr argues that his CSRT employed procedures that differed from those in existence at the time of the MCA's enactment, without ever identifying a specific difference. *See* Opp. at 17. With regard to the matter at issue here, however, there was no material difference between the 2004 and 2006 rules. *Compare* Memorandum for the Secretary of the Navy, from Paul Wolfowitz, Deputy Secretary of Defense, *Re: Order Establishing Combatant Status Review Tribunal*, ¶ (a) (July 7, 2004) ("'[E]nemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."), *with* Memorandum for the Secretaries of the Military Departments, *et al.*, from Gordon England, Deputy Secretary of Defense, *Re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba*, encl. 1 at 1 (July 14, 2006) (same).

Second. Khadr argues that Congress did not embrace the CSRT procedures in the MCA because it provided for their judicial review in an earlier statute, the DTA. *See* Opp. at 16-17. That argument is specious: It is akin to arguing that Congress did not ratify the procedures it ratified for military commissions because it also provided for their judicial review. *See* 10 U.S.C. § 950g.

Finally, Khadr seeks to set aside the interpretation of the Secretary of Defense, promulgated in the Rules for Military Commission, that CSRTs conducted before the MCA's enactment are sufficient to establish military commission jurisdiction. *See* Gov. Supp. at 29-30. That interpretation is from the agency charged with the

to his claims, the Defense argues that the MCA violates the Constitution and international law. Both arguments are baseless, and the second is irrelevant.

**A.**

The Defense's primary argument against the sufficiency of Khadr's CSRT determination to establish military commission jurisdiction is that the Constitution forbids both Congress and the President from statutorily designating members of al Qaeda and the Taliban as unlawful enemy combatants and establishing military commissions to such persons once they are determined to be members. Specifically, the Defense raises claims under the Ex Post Facto and Bill of Attainder Clauses, U.S. Const. art. I, § 9, cl. 3, and general separation of powers principles. *See* Opp. at 22-25. Khadr's arguments reflect a fundamental misunderstanding of United States constitutional law.

*1.*

As an initial matter, controlling D.C. Circuit precedent unambiguously holds that the Constitution does not apply to aliens held outside the United States, including those held at Guantanamo Bay, such as Khadr. *See Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).[10] The D.C. Circuit has direct review over

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administration of the MCA, issued in the manner specified by Congress, and is entitled to deference under *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Khadr argues that *Chevron* does not apply "in the criminal context." Opp. at 19-20. Of course, the Government's litigating position regarding the scope of a *substantive criminal offense* is not subject to Chevron deference, and each federal criminal case cited in Khadr's brief stands for that limited proposition. The matter at issue in this case, however, is crucially different: Military commissions are established, conducted, and concluded by one administrative agency—the Department of Defense—and its personnel. And it is a well-established principle that an agency is entitled to *Chevron* deference when it interprets its organic statute to establish procedural rules—as opposed to substantive offenses—to govern its adjudications within the agency. *See, e.g., De Sandoval v. U.S. Att'y Gen.*, 440 F.3d 1276, 1281 (11th Cir. 2006) (applying *Chevron* to Attorney General's promulgation of procedures for granting removal hearings to aliens in immigration adjudications within the Department of Justice).

[10] Khadr suggests that these longstanding doctrines may not govern here because, in his view, the Ex Post Facto and Bill of Attainder Clauses impose structural limitations on Congress. *See* Opp. at 20-21. That precise

this court, *see* 10 U.S.C. § 950g, and its decisions are binding until expressly overturned. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). This Court need proceed no further to reject Khadr's constitutional claims.

In any event, raising such claims must take account of the fact that Congress passed and the President signed the MCA *precisely because* the Supreme Court invited the politically accountable branches to do so. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774-75 (2006); *see also id.* at 2799 (Breyer, J., concurring) ("*Nothing* prevents the President from returning to Congress to seek the authority he believes necessary [to try members of al Qaeda before military commissions]."") (emphasis added). The ambitiousness of Khadr's assertion that *all three* branches of the U.S. Government misunderstood the constitutional boundaries of military commissions, is matched only by its erroneousness.

*2.*

On their own terms, Khadr's constitutional claims are meritless. First, it is well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not violate the Ex Post Facto Clause. Thus, courts have long held that the Clause does not apply to the abolition of old courts and the creation of new ones, *see, e.g.*, *Duncan v. State*, 152 U.S. 377 (1894), the creation or alteration of appellate jurisdiction, *see, e.g.*, *Mallett v. North Carolina*, 181 U.S. 589 (1901), the transfer of jurisdiction from one court or tribunal to another, *see, e.g.*, *People ex rel. Foote v. Clark*, 119 N.E. 329 (Ill. 1918), or the modification of a trial panel, *see, e.g.*, *Commonwealth v. Phelps*, 96 N.E. 349 (Mass. 1911). The rationale for these decisions is clear: The Ex Post Facto Clause applies only to laws that retroactively alter the definition or consequences of a criminal offense—not to *jurisdictional* provisions that affect

argument was rejected by the D.C. Circuit, *see Boumediene*, 476 F.3d at 993, and is contrary to numerous Supreme Court decisions, *see, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966); *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

where or how criminal liability is adjudicated. CSRTs, of course, are non-criminal proceedings,[11] and they therefore do not implicate the Ex Post Facto Clause. *Compare* Opp. at 22-23. Moreover, even if there was some interpretation under which a CSRT could be considered a "criminal proceeding," the substantive and procedural protections that it affords are more generous than those ever afforded to enemy combatants in American history.[12] Khadr cannot credibly claim that the creation of CSRTs retroactively made him worse off than before he supported an organization at war with the United States.

For similar reasons, Khadr's Bill of Attainder claim, *see* Opp. at 24-25, fails. Bills of attainder are "legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them *without a judicial trial* . . . ." *United States v. Lovett*, 328 U.S. 303, 315 (1946) (emphasis added). To state the rule is to demonstrate the error of Khadr's argument. Neither a CSRT determination, nor Congress's assignment of dispositive jurisdictional weight to it, has any effect on an individual's criminal guilt or innocence; it simply makes him amenable to a "judicial trial," the very prospect of which renders the Bill of Attainder Clause inapposite. Notwithstanding Khadr's assertions to the

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[11] *See, e.g.*, Hearings Before the Senate Committee on Armed Services, *Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld, S. Hrg. 109-881, at 62 (July 13, 2006) (statement of Sen. Graham) ("[W]e have a CSRT procedure that Senator Levin and myself and others worked on that deals with determining enemy combatant status. That is a *noncriminal* procedure . . . .") (emphasis added); RMC 202(b), *discussion note* ¶ 1 ("The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government's obligation to prove beyond a reasonable doubt the elements of each substantive offense charged under the M.C.A. and this Manual.").

[12] As Senator Kyl explained: "The level of due process that these detainees are getting [under CSRTs and the DTA] far exceeds the level of due process accorded to any combatants, captured combatants, lawful or unlawful, in any war in human history. . . . We are giving [alien enemy combatants] a lot more . . . than they are legally entitled to under either international [law] or the law in the U.S. Constitution." 152 Cong. Rec. S10268 (Sept. 27, 2006) (quoting Senate Judiciary Committee witness David Rivkin); *see also id.* at S10267 (Sept. 27, 2006) (statement of Sen. Graham) ("I am of the opinion that the Combat Status Review Tribunal . . . is fully compliant with article 5 of the Geneva Conventions."); *id.* at S10268 (Sept. 27, 2006) (statement of Sen. Kyl) ("[I]t bears emphasis that the CSRT gives unlawful enemy combatants even more procedural protections than the Geneva Conventions' Article 5 hearing give[s] to lawful enemy combatants."); *id.* at S10361 (Sept. 28, 2006) (statement of Sen. Cornyn) ("[T]he Detainee Treatment Act . . . provides . . . a review through a combatant status review tribunal, with elaborate procedures to make sure there is a fair hearing . . . .")

contrary, *see* Opp. at 24, his guilt or innocence will be determined in an adversarial proceeding in which the accused has a right to both civilian and military defense counsel, *see* 10 U.S.C. §§ 948k, 949a(b)(1)(C), the right "to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing," *id.* § 949a(b)(1)(A), the right to be present at all sessions of the military commission, *see id.* § 949a(b)(1)(B), and above all, the presumption of *innocence*, *id.* § 949*l*(c). Khadr simply cannot claim that the MCA constitutes "a law that legislatively determines *guilt* . . . ." Opp. at 24 (internal quotation marks omitted and emphasis added).

Finally, Khadr argues that the MCA's provision for making CSRTs "dispositive" for military commission jurisdiction somehow violates the constitutional holding in *United States v. Klein*, 80 U.S. 128 (1871). *See* Opp. at 21-22. As the *Klein* Court emphasized, however, its decision was premised on the Court's skepticism as to Congress's ability to "prescribe rules of decisions to the *Judicial Department* of the government in cases pending before it." *Id.* at 146 (emphasis added). Of course, no such separation of powers question arises here because Congress's "rule of decision"—namely, that Khadr's CSRT is "dispositive" for purposes of military commission jurisdiction—merely makes one determination of one *Executive Branch* tribunal dispositive in another *Executive Branch* tribunal, neither reaching across the branches nor providing a rule of decision in an Article III court. Moreover, it is not at all clear that *Klein* (which involved a jurisdiction-*stripping* provision) "should apply with only greater force," Opp. at 22, in the context of the MCA's jurisdiction-*granting* provisions. As the Court's interpretation of the DTA's habeas provision illustrates, *see Hamdan*, 126 S. Ct. at 2764-66, Article III courts

are skeptical with respect to the former, while the Defense cites nothing to suggest that courts harbor a similar—much less "greater"—skepticism with respect to the latter.

**B.**

The Defense attempts to deny that unlawfulness is determined organization by organization, rather than individual by individual. *See* Opp. at 18-19. But the text of the MCA and Article 4 so demonstrates, and Congress so determined. *See* Gov. Supp. at 23-24. The Defense does not engage this dispositive analysis. Instead, Khadr claims only that this proposition is foreclosed by the Supreme Court's interpretation of Article 5 in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The Supreme Court held no such thing.

As an initial matter, determinations of status are appropriately individualized in the CSRT process. The distinctions between lawfulness and unlawfulness (under the MCA) and prisoner of war status *vel non* (under Article 4 of the Third Geneva Convention) turn on the nature of the "force" or "corps" or "movement," that is, the *organization*. Once that organization enters an armed conflict with another armed force, a tribunal must make an *individualized* determination as to a given detainee's degree of association with a given "armed force." That latter determination is precisely the one that Khadr's CSRT made, and it is why he was individually and properly determined to be an unlawful enemy combatant.

The Supreme Court's decision in *Hamdi* supports this result. There, the Court held that Hamdi's association with the Taliban must be determined by a "neutral decisionmaker." 542 U.S. at 533 (plurality). But none of the Justices contested that association with Taliban, or with al Qaeda, was enough, without more, to justify indefinite detention during the ongoing armed conflict. The Court viewed as axiomatic the fact that al Qaeda is an unlawful organization and that the United States is at war with al Qaeda. And the Court's various opinions contain no

suggestion—much less a holding—that Congress could not determine an organization's unlawfulness as a matter of statute.

Khadr's suggestion to the contrary turns on two words in an almost-5,000-word concurring opinion by Justice Souter. *See* Opp. at 19. In *Hamdi*, Justice Souter suggested that Army Regulation 190-8, which was modeled on Article 5 of the Third Geneva Convention, seems to preclude a "categorical pronouncement" of an individual's combatant status. *See Hamdi*, 542 U.S. at 550 (Souter, J., concurring). As explained above, however, neither the MCA nor the CSRT process constitutes a "categorical pronouncement" of any individual's combatant status. In fact, in the wake of *Hamdi*, the CSRT process was created, modified, and ultimately ratified in the MCA because it satisfies both the domestic and international law concerns identified by the Supreme Court. As Senator Graham explained:

> What is going on at Guantanamo Bay is called the Combat Status Review Tribunal, which is the Geneva Conventions protections on steroids. It is a process of determining who an enemy combatant is that not only applies with the Geneva Conventions and then some, it also is being modeled based on the O'Connor opinion in *Hamdi*, a Supreme Court case, where she suggested that Army [R]egulation 190-8, sections 1 through 6, of 1997, would be the proper guide in detaining people as enemy prisoners, enemy combatants. That regulation is "Enemy Prisoners of War, Retained Personnel, Civilian Internees, and other Detainees." We have taken her guidance. We have the Army [R]egulation 190-8, and we have created an enemy combat status review that goes well beyond the Geneva Conventions requirements to detain someone as an enemy combatant.

151 Cong. Rec. S12656 (Nov. 10, 2005); *see also* 152 Cong. Rec. S10267 (Sept. 27, 2006) (statement of Sen. Graham). Neither the MCA nor Article 4 nor common sense calls for the nature of al Qaeda, as a force, to be revisited in each hearing. The texts of both provisions call for individualized determinations of a person's association with a force, and CSRTs meet that need.

## III. Khadr's Claim That He is a "Former Child Soldier" Is Not Properly Presented and Is Mistaken in Fact and Law

The Defense's argument regarding jurisdiction and "former child soldiers" was not an issue raised in the order underlying this appeal and is not properly before this Court. In order to fully and fairly address this issue, a significant amount of fact finding is required. Therefore, the appropriate forum at which to raise this argument is the trial court, and this Court should not entertain it.

Khadr's argument cannot be squared with the facts surrounding his capture or his alleged criminal conduct. And the Defense's legal argument has no legal basis. Military courts have recognized the obvious principle that a person is not subject to military court-martial jurisdiction on the basis of membership in the U.S. military if he was not validly enlisted in the military under U.S. domestic law. But al Qaeda has no such law; if it had, al Qaeda's noncompliance with it could not be held against the United States; and an enemy force's deployment of young soldiers should not provide that force with wholly immunized tools to commit war crimes with impunity.

### A.

Khadr's were not the acts of a child. From as early as 1996 through 2001, Khadr often visited and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. Khadr also visited various al Qaeda training camps and guest houses and met with senior al Qaeda leaders. *See* AE 017, attachment 3.

Following al Qaeda's terrorist attacks on 11 September 2001, which resulted in the loss of nearly 3000 lives, Khadr received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *Id.* Khadr later received an additional month of training on landmines and joined a group of al Qaeda operatives and converted landmines into

improvised explosive devices ("IEDs") capable of remote detonation. Khadr put this training to use around July 2002 by planting IEDs in the ground where, based on his previous surveillance, U.S. troops were expected to travel.

Khadr was captured on 27 July 2002 after a firefight with U.S. forces in a compound near Khost, Afghanistan. Prior to the firefight, U.S. forces approached the compound and asked the Khadr and the other occupants to surrender. *Id.*, attachment 5.

Rather than surrender, Khadr and three others in the compound "vowed to die fighting." *Id.* Khadr then armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.* At some point during the firefight, U.S. forces evacuated any remaining women and children trapped in the compound. Khadr ***did not*** leave the compound at this time.

Toward the end of the firefight, Khadr threw a grenade that killed Sergeant First Class Christopher Speer, U.S. Army. *Id.*, attachment 6. American forces then shot and wounded the accused, and after his capture, American medics administered life saving medical treatment to the accused. *Id.*, attachment 4.

In subsequent interviews, Khadr gave reasons why he was involved in terrorism and fighting U.S. forces. He stated that he made IEDs to "kill U.S. forces." *Id.*, attachment 6. He also stated that he understood there to be a $1500 reward placed on the head of each American killed, to which he added, "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8.

**B.**

Khadr incorrectly argues that he must be eligible to serve in the U.S. armed forces in order for the military commission to assert jurisdiction. *See* Opp. at 26-27. As an initial matter,

Khadr's unwillingness to join a military establishment and fight according to the laws of war is precisely why he falls within the jurisdictional provisions of the MCA as an "alien unlawful enemy combatant." *See* 10 U.S.C. § 948d(a). As such, his argument is a category error. Also, Khadr qualifies for trial by military commission in part because he is not a U.S. soldier eligible for trial by court-martial under the reasoning set forth in *United States v. Blanton*, 7 U.S.C.M.A. 664, 666-67 (1957). *Compare* Opp. at 26-27 (attempting to import the *Blanton* rule into the military commission process). *Blanton*'s axiomatic principle—that the United States must follow its own laws properly to enlist a person into its own military and to subject that person to the military's rules—has no application here.

Khadr also cites various sources of international law as standing for the proposition that children, due to their general protected status, will always be victims of the person who helped put them on the battlefield. *See* Opp. at 27 n.35. This argument is patently false. Minors are not immune from war crimes prosecutions when they have committed law of war violations. A contrary principle would give rogue regimes and non-state armed groups every incentive to enlist minors, because any potential war crime they commit would be done so with absolute impunity.

In any event, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, GA Res. 54/263, U.N. Doc. A/RES/54/263, Annex (May 25, 2000) ("Optional Protocol") prohibits the recruitment of persons under 18 into non-state armed groups and their use in hostilities. U.N. Doc. A/RES/54/263, article 4. But these are international obligations of the recruiting force. Nothing in the Optional Protocol prohibits the United States from charging and trying Khadr at a military commission when the enemy deploys him against the United States. The Optional Protocol simply does not address criminal offenses by or criminal proceedings against persons under age 18.

The Government understands that both international law and U.S. law, as cited here and in the Defense's brief, recognize the special status of children. When Khadr, who was almost 16 years of age at the time of his capture, performs the type of law of war violations and terrorist activities alleged above, however, he cannot be immune from criminal prosecution. In his own words, Khadr explains that he is a terrorist trained by al Qaeda and his efforts in making and planting IEDs was part of his mission. *See* AE 017, attachment 3. His desire to "kill a lot of American[s] to get lots of money" is also not the sentiment of a child victim. *See* AE 017, attachment 8.[13]

Khadr references the Juvenile Delinquency Act ("JDA") as a jurisdiction stripping statute for the purposes of minors before a military commission. *See* 18 U.S.C. § 5031. It is important to note that 18 U.S.C. § 5031 does not apply to the military commission process. As important, U.S. law explicitly authorizes charging and prosecution of individuals for offenses they committed while under age 18, including those who were 15 years old at the time of the offenses. And U.S. law clearly authorizes charging and prosecuting such offenders as adults, rather than as juveniles, under exceptional circumstances. Nothing in U.S. law prohibits charging and prosecuting Khadr by military commission in accordance with the MCA, and the procedures accorded the accused are amply sanctioned under U.S. law. Even if the JDA were applicable to this case, its provisions require that courts consider the interests of justice. For example, the types of crime committed and the role the accused played must be taken into account. In this case, Khadr is accused of committing murder in violation of the law of war, and attempted murder, among other offenses. The video of Khadr making and then planting IEDs adds

[13] Article 3 of the Optional Protocol prohibits the involuntary recruitment of persons under the age of 18. The Defense has not provided any evidence that his involvement with the al Qaeda terrorist organization or his participation in terrorist activities and was in any way involuntary. His age alone is not sufficient to show that he acted against his will.

significant weight to the argument that he is no "child victim." Rather he is alleged to have actively and willingly taken part in some of the most serious offenses punishable by law.

**Prayer for Relief**

The Appellant respectfully requests this Honorable Court grant this appeal and remand this case to the trial court for hearings consistent with this Court's opinion.

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//s//
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## CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

1. This brief complies with the type-volume limitation of Rule 14(i) because:

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Dated: 17 August 2007

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 17th day of August 2007.

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